BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Adolph Fuller, dated December 10, 1999, alleging discrimination with respect to occupancy of accommodation because of race, colour, and ethnic origin; and discrimination with respect to harassment in accommodation because of race, colour and ethnic origin by Sameh Daoud and Johanne Desquilbet.

B E T W E E N:

Ontario Human Rights Commission

-and-

Adolph Fuller

Complainant

-and-

Sameh Daoud and Johanne Desquilbet

Respondents

DECISION

Adjudicator: Patricia E. DeGuire

Date: August 17, 2001

Board File No.: BI-316-00

Decision No.: 01-019

Board of Inquiry *(Human Rights Code)*
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APPEARANCES

Ontario Human Rights Commission	)	William R. Holder, Counsel
Adolph Fuller, *Complainant*	)	on his own behalf
Sameh Daoud, *Respondent* Johanne Desquilbet, *Respondent*	)	on his own behalf and agent for Johanne Desquilbet

INTRODUCTION

The record indicates that on December 10, 1999, Adolph Fuller ("Fuller"), the Complainant, filed a complaint with the Ontario Human Rights Commission ("Commission"). In the complaint he alleged that Sameh Daoud and Johanne Desquilbet ("Respondents"), who are spouses of each other, violated his rights to equal treatment with respect to occupancy of accommodation and his right to be free from harassment by the landlord or agent, because of race, colour, and ethnic origin. The Commission referred Fuller's complaint to the Board of Inquiry ("Board") on April 11, 2000. According to its usual practice, the Board commenced the hearing by conference call on May 4, 2000.

ISSUES

1. Did the Respondents violate Fuller's right to equal treatment with respect to occupancy of accommodation, without discrimination because of his colour, ethnic origin and race contrary to subsection 2(1) of the Human Rights Code ("Code")?

2. Did the Respondents violate Fuller's right to be free from harassment at their hands because of his colour, ethnic origin and race contrary to subsection 2(2) of the Code?

3. What is the appropriate remedy?

DECISION

The Board finds that the Respondents violated Fuller's right to equal treatment with respect to occupancy in accommodation and the right to be free from harassment by the landlord contrary to subsections 2(1) and (2). The Board's remedial orders are set out below under the section entitled "Order".

PROCEDURAL ISSUES

The hearing processes were fraught with non-compliance by the Respondents. That has impeded the normal adjudicative process throughout the hearing and ultimately, balancing the competing evidence of the Complainant and the Respondents. In that respect, a history of procedural challenges might be helpful for the record.

Post –referral

After the Board received the referral of this case from the Commission, it sent out a "Notice of Hearing" to all the parties dated April 13, 2000. Essentially, that notice informed all the parties that the hearing would commence, by conference call, on May 4, 2000. In addition, the Board enclosed a copy of its *Rules of Practice* ("*Rules*") and its *Guide to Hearings* to Fuller and the Respondents.

Matters Determined at the Initial Conference Call

The participants in the conference call were, William Holder for the Commission; Fuller on his own behalf; Sameh Daoud on his own behalf; and Johanne Desquilbet on her own behalf. During the hearing, the Board directed the Commission and Fuller to file and serve their Pleadings and to provide disclosure to the Respondents by June 12, 2000. The Board directed the Respondents to file and serve their Response and to provide disclosure to the Commission and Fuller by July 7, 2000. The parties assured the Board that they were agreeable to those dates.

The parties consented unanimously to try to resolve this matter by mediation in Toronto on August 3, 2000. The Board reminded all the parties of the *Rules* concerning adjournments and motions, and its policy governing those two procedures. By letter dated May 18, 2000, sent to each party, the Board confirmed the matters determined at the initial conference call.

Notice of Hearing Dates

On August 3, 2000, at 11:00 hours, the mediation was adjourned because neither Respondent attended. The Board set the matter down for a hearing on the merits to be held on December 12 and 13, 2000. After the mediation was adjourned, the Board left a message on the Respondents' voice mail informing them of the dates of the hearing, and that they had not filed or served their Response or provided disclosure as required and agreed to by them, and asked them to do so as soon as possible.

Pleadings and Disclosure

The Deputy Registrar sent a letter dated August 4, 2000, to all the parties confirming the hearing dates. In part, the letter states:

> "I am further advised that the Respondents were ordered to file a written Response and provide disclosure by July 7, 2000 and that they have not done nor have they sought any extension of time from the Board for doing so. The Respondents are reminded of their obligations to comply with the Board's Order and instructed to provide their response and disclosure to the parties forthwith. If the Respondents do not provide their Response and disclosure the Board may not permit them to rely on those documents or arguments in the hearing."

At no time between August 4, 2000, and December 12, 2000, did the Board receive a request from the Respondents for an extension of time to file and serve their Response or to provide disclosure.

First Day of Hearing on the Merits

On December 12, 2000, the first day of hearing on the merits, only Mr. Daoud attended. After the Board had convened the hearing formally, Mr. Daoud handed a letter-size sheet of paper to the Board. The paper bore the following writing verbatim: "Brampton, Tuesday December 12th, 2000 I, Johanne Desquilbet authorize my husband Sameh Daoud to represent me today. With the snow storm

there is no school today for my children and I couldn't find a babysitter at the last moment. Best Regards, Johanne Desquilbet." ("Document"). There is no address on the Document, nor is it addressed to any particular person or entity. The Document is signed, but there is no witness to the signature. None of the parties raised any objection to the request.

Accordingly, for the record, the Board acknowledges Sameh Daoud as representing himself as well as agent for Johanne Desquilbet. Also, the Board acknowledges that any communication made by Sameh Daoud during the hearing would be received by it as communications from the Respondents unless Sameh Daoud stated to the contrary. Notably, at no time during the hearing did he make such a disclaimer.

Preliminary Issue

At the commencement of the hearing on December 12, 2000, the Commission informed the Board that the Respondents still had not served their Pleadings or provided disclosure to it and Fuller. As a preliminary issue, the Commission sought an Order from the Board, pursuant to *Rule* 43, precluding the Respondents from relying on any documents or facts that should have been produced in the Response or disclosure. Fuller adopts the Commission's position.

The Commission and Complainant's Position

The Commission argues that it has been in a predicament from the onset of the complaint because the Respondents refused to participate in the investigation. Initially, upon much prodding for information, they provided a two or three line reply and then refused to cooperate further. The Commission avers that as a result, its statutory obligation to investigate the complaint was thwarted. In addition, it was unable to determine whether the Respondents have a lawful defence. Further, the Commission argues that twice the Board ordered the Respondents to serve and file their Response and provide disclosure, yet they have failed to comply. Moreover, the Commission argues that the evidence that the Respondents intend to lead would be new to it and that would prejudice its ability to proceed with the case. The Commission raises the concern that the Respondents would spring upon

it documents and a position merely to gain a litigious advantage and further seek to subvert the Board's Orders and *Rules*. Also, the Commission did not have a copy of Sameh Daoud's statement on which to cross-examine him. Therefore, the Commission entreats the Board to make an Order precluding the Respondents from leading any new evidence. Fuller adopts the Commission's position.

Daoud's Arguments

In reply, the Respondents submit that they had nothing more to say or give than what they had submitted to the Commission. They aver that the Commission has requested from them documents they do not have. They aver that they did not consent to mediation. The Board pointed out that the records show that they did consent to mediation and a letter was sent to them confirming that and the mediation date. The Board asked whether they had received its letter dated May 18, 2000. Mr. Daoud states that he might have received it, but he did not read anything. He merely put it in a file because in his mind, he was asking that the case go to a hearing. He concurred that he simply ignored the Board's letter of May 18, 2000. When asked to give reasons why the Board should allow him to lead evidence now that he failed to disclose earlier, he said because in his view, the same argument Fuller brought in the Superior Court is the same information he will bring now. There is nothing else to provide. Despite the Board's explanation of the marked differences between the role of the Superior Court and dealing with the Commission or the Board, Mr. Daoud states that as far as he was concerned, he had made full answer before to the Superior Court, and therefore, there is no need to be repetitive.

The Board's Order

The Board ordered the Respondents to reduce to writing, their will-say evidence they intended to give on their own behalf and to give a copy to the Commission and to Fuller. That was to be done the earlier of, before they gave evidence or by December 15, 2000, 17:00 hours. Pursuant to *Rule* 43, if they failed to comply with the Board's Order, they would not be allowed to lead any new evidence on their behalf. Also, their evidence would be limited to the scope of the content of the written statement given to the Commission and to Fuller.

On December 12, 2000, Sameh Daoud submitted a document entitled "witness statement" to the Commission and Fuller. It states verbatim:

> "Witness statement Dec 12, 2000 The I the undrsing SAMEH DAOUD there is no discremination OR any of the Compaint allegated In his complain against us. There is nothing hapand that me or my wife about his race. SAMEH DAOUD. That Adolph with one of my tenant and his was evected by the Ontario Rental Housing and By the police raport that Mr Adolph has taken us to the superior court and I have nothing else to add."

That is the only statement the Respondents have provided to the Commission or to Fuller. The Board accepts that statement as compliance with its Order.

The Commission and Fuller presented their evidence on the first day. Fuller was the only witness. At that time, the Respondents informed the Board that they needed three hours to prepare for the cross-examination. Finally, Mr. Daoud stated that the Respondents had no questions for the Commission or Fuller.

Second and Final Day of Hearing on the Merits

The final day of hearing was scheduled for March 12, 2001. The Board notified all the parties in writing several weeks in advance of that date. On March 7, 2001, the Respondents, via facsimile, informed the Board that they would not be attending the hearing on March 12, 2001, because they had an "urgent trip to Montreal." On March 8, 2001, by facsimile, the Respondents informed the Board that they had to appear in "the superior court of Montreal for children custody and therefore requested another date." At no time did either respondent provide confirmation to the Board of that obligation, nor did either inform the Board in what capacity he or she had to attend the court in Montreal: that is, being a party or a witness. The Respondents did not ask for an adjournment, but the Board treated the letter as a request for an adjournment. The Commission and the Fuller opposed the adjournment.

By letter dated March 8, 2001, the Board informed all the parties that the Respondents' request for an adjournment was denied and informed the parties that the hearing would continue as scheduled unless by Friday, March 9, 2001, at 5:00 p.m., the Respondents provided the Board with proof that they had to appear before a court in Montreal. The Board's rationales were, that the hearing date was set a long time ago with the consent of all the parties, and the Respondents did not provide proof to the Board that they had to attend court in Montreal. The Respondents did not provide the evidence nor did they respond to the Board's letter. Moreover, neither Respondent attended the hearing on March 12, 2001. The Board proceeded to hold the hearing.

Notwithstanding the Respondents' record of failing to comply with Board Orders, the Board directed the Commission to forward a copy of its written arguments to the Respondents. In turn, the Board invited the Respondents to make written submissions on their behalf. To that end, the Board granted three extensions. In response to the Deputy Registrar's inquiry about whether they had received the Commission's submissions, Ms Desquilbet advised that they had received the materials and, perhaps, her husband was doing something, but she did not know. The Board granted an extension to April 17, 2001, so that the Respondents could file written submissions. Neither Respondent has ever filed submissions: nor have they filed or served Pleadings or provided disclosure.

SUMMARY OF EVIDENCE

Fuller's Evidence

Fuller says that in March 1999, he was looking for an apartment. He answered an advertisement in the Brampton Guardian that listed a basement apartment for rent located at 5 Juliana Square, Brampton. The advertisement listed the proposed monthly rent as $590 monthly. Fuller met with Mr. Daoud, the landlord, to view the apartment. After viewing the apartment, he decided to take it. Mr. Daoud and Fuller reached an agreement to rent the apartment. Fuller gave Mr. Daoud a $100 deposit towards the first and last month's rent and promised to return to pay the balance. Fuller did not sign a lease.

Fuller commenced residing at 5 Juliana Square, Brampton on March 1, 1999. He met Ms Desquilbet, the spouse of Mr. Daoud then. He paid Mr. Daoud $1190 and procured a receipt that was signed by Mr. Daoud alone: (see *Exhibit* 1 (b)). Mr. Daoud owed him $10 change, which, at the date of the hearing Fuller says is still owing to him.

Rental Unit

The rental unit, a basement apartment, comprised three rooms, viz: a bedroom, a bathroom and an open area. Fuller was to have exclusive use of the basement except the laundry room. The arrangement was, the Respondents and Fuller would share the laundry room. When the Respondents needed to use it, they would inform Fuller first and always knock on the door before entering. The door was between the basement and the first floor.

Unwelcome Visits to Fuller's Apartment

The Respondents did not always comply with that arrangement. Fuller relates two specific incidents. On one occasion, Mr. Daoud came downstairs and entered his living quarters unannounced when Fuller's girlfriend was just coming out of the shower. On another occasion, Mr. Daoud entered his living quarters unannounced when a friend was just coming out of the bathroom. Fuller had spoken to Mr. Daoud about the intrusion of his privacy when the first incident with his girlfriend happened. Mr. Daoud's excuse was that he had installed a door and wanted to paint it. Fuller commented that Mr. Daoud had the entire week to paint the door, but chose to paint it on the weekend when his girlfriend was visiting.

The Respondents had entered his apartment, in his absence, without permission. He drew that conclusion from the tell-tail system he had set up. He would put "things" on the door so that if anyone entered he would know. Fuller was displeased by the intrusions and had spoken to Mr. Daoud about it several times. He decided to install a lock on the door, from his side, so that the Respondents would

not be able to open the door from their side. He believed the lock would control the Respondents' unwelcome entry and separate his apartment from theirs. Fuller informed Mr. Daoud he was going to install a lock. Mr. Daoud did not object. The lock did not stop the intrusions. In Fuller's view, Mr. Daoud was supposed to have a key because he was the landlord, so he just used his key to enter Fuller's apartment whenever he pleased. Then he would exit through another door and leave Fuller's entrance door open.

Fuller says the incident that occurred on March 13, 1999, was the catalyst for being removed from his residence. He remembers it well. It was the night of the Mike Tyson fight. He had watched the fight at a friend's home. When he returned home, several "things" he had put on the door were on the floor and the door was open. He called the police immediately. He asked the police to explain to Mr. Daoud that he should not enter his apartment "whenever he likes for he might come home get angry and something bad could happen." One hour after placing the call, the police arrived. They came to his apartment and asked him if anything was missing. He replied, no. The police then went upstairs to speak to the Respondents for about ten minutes or so. Then he heard Ms Desquilbet screaming that Fuller has a criminal record and she wanted him out of the residence. The police told her that her concern was a civil matter and he could not do anything about it. The police left soon after. Then, Ms Desquilbet started to stomp on her floor (his ceiling) and yelled "nigger, how could he do this. This f---ing nigger." She kept stomping on the floor. He turned up his music so that he would not hear her epithets and noise and went to bed.

Fuller's Arrest

The next morning, March 14, 1999, Fuller took his dog in the backyard to relieve itself. Ms Desquilbet stuck her head out of her backdoor and yelled to him that the police said it is our yard you cannot put the dog there. He replied that she might as well call the police because he would let the dog relieve itself. At that juncture, she began to scream "white power – you'll see white power nigger." She repeated that a few times. During this carry-on, Mr. Daoud did not intervene. He just stood there.

In the wake of Ms Desquilbet's carry-on, Fuller told her he was going to call the police and inform them of what had occurred. She replied that she was going to call the police as well. She closed the door and went inside. Fuller called the police from his cell-phone.

Fuller was standing in the driveway with his dog when the police arrived. Three cruisers attended. A Black police officer exited from the first cruiser and went upstairs to the Respondents' residence. In the second cruiser were a male and a female officer. In the third cruiser there was one officer. All the police officers exited the cruisers and went to the Respondents' residence. Fuller states that in his mind he thought, "I called you twice and you go to Sam's apartment."

Fuller's dog was behaving aggressively, so he took it downstairs and locked it up. He waited for the police to come to him. About ten minutes after they arrived, the Black police officer came to talk to him. He asked Fuller where was his dog. Fuller told him he had locked it away because it was behaving aggressively. The officer said, "good, because you are under arrest." He asked the officer why he was being arrested. The officer informed him that he was under arrest for "threatening death and threatening rape." Fuller states that he did not threaten either Respondent: nor did he "grab his genitals" as he learned Mr. Daoud had informed the police.

Fuller states that the police escorted him to the police station where he was placed in a holding cell. During that time, he was stripped searched, left naked in the cell and was pressured to admit that he had threatened to kill and rape Ms Desquilbet. Finally, the police "admitted" to him that was not his style of criminal activity. They processed the Information against him and then released him on a Form 10 and 11.1 with the conditions that he has no contact directly or indirectly with the Respondents and the boundary restriction of not to be within 100 meters of 5 Juliana Square, Brampton, which is, the Respondents' residence: (*Exhibit* 3). As a result, Fuller stayed at the Super 8 Hotel for seven days until a friend assisted him. He paid $65 per day for the hotel accommodation.

The boundary restriction prohibited Fuller from entering his residence or retrieving his belongings unless he was accompanied by a police officer. He was able to retrieve his belongings after

making at least three visits with the police. On April 8, 1999, he attended with a police officer to collect his property. The Respondents refused to let him in until the police directed Mr. Daoud to do so. In his view, the unit was as he left it on March 14, 1999. There was no damage to the property. He took pictures of the unit. He found mostly all of his belongings, including his bed and mattress, "stuffed" in a shed and some were outside in the rain. The Respondents were able to remove his belongings because of an Order from the Ontario Rental Housing Tribunal ("Tribunal").

Order to Evict and for Damages

The Respondents made an application to the Tribunal to terminate Fuller's tenancy early. The grounds were that Fuller had abandoned the unit; had caused damage to the unit; and posed a danger to their safety. The Respondents had provided the Tribunal with a Certification of Service indicating that they had provided notices of termination and hearing to Fuller by placing a copy of the application under the door of Fuller's unit. But on March 14, 1999, the police had arrested Fuller and had prohibited him from being in a specified vicinity of that location. Fuller did not receive the notice. He saw it for the first time on April 8, 1999, when he attended the premises with the police to collect his belongings. As a result, Fuller did not attend the Tribunal's hearing.

On April 9, 1999, Fuller filed a "Request to Review an Order" with the Tribunal: (see *Exhibit* (1)(d)). His explanations for the request were: that he did not abandon the unit because he was removed by the police; he did not threaten anyone's life; and he did not damage anyone's property. He provided proof of the boundary restriction, but the Tribunal denied his request: (see *Exhibit* 1 (d)). Also, he requested that the Order be stayed. His reason was that he was arrested after calling the police because the landlord kept visiting his apartment and the landlord's wife had said to him "white power" and "nigger". The request for the review was denied and the Order remained in effect. The Tribunal's reasons were that Fuller had the opportunity to attend the hearing or send an agent and failed to so do: (see *Exhibit* 1(d)).

Fuller filed another request for review on May 6, 1999: (see *Exhibit* 1(d)). The Tribunal upheld the initial order on the ground, *inter alia,* that the tenant was no longer in possession of the rental unit

and the Tribunal had no authority to put him back in possession of it: (see *Id.*). After exhausting the processes at the Tribunal and being unsuccessful in doing so, Fuller paid the sum of $1,260 as ordered by the Tribunal as recompense for the damage to the Respondents' property.

Criminal Proceedings for the Charge

The accused's copy of the Synopsis in the Peel Regional Police Force Court Package 99-038062 indicates that Fuller was arrested and charged with "Utter Death Threat": (see *Exhibit* 1(c). Notably, the criminal charge against Fuller was in the Ontario Court of Justice in Brampton. The prosecutor withdrew the charge based on the tape recording of the 911 calls made by Fuller and the Respondents. Fuller was required to enter into a peace bond with the Respondents.

Civil Proceedings

Fuller commenced proceedings in the Ontario Court (General Division), Brampton Small Claims Court, as it then was, to recover the $1,260 from the Respondents. The court ordered the Respondents to pay Fuller $1,260. As of the date of this hearing, he had not received payment. To date the Respondents have not reimbursed him for the unearned portion of the rent.

Impact of the Respondents' Behaviour on Fuller

Fuller describes the incident as a "rough ordeal". He states that the ordeal made him feel very "messed up", and that it was "very hard to take the accusation of rape. It really hurt me." He states, "this event will always remain in my memory." Fuller states that he had come to Canada when he was nine years of age. He has had relationships with girls and women of the dominant culture. The incident was a shock to him. He states: "it was a freaky situation for me." When asked to explain "freaky situation", he said, "I had this woman yelling white power at me when ten days ago they rented me an apartment." Fuller states that he had done "other things and I have paid for it. It was just very brutal to say I threatened to rape a woman. Besides, Ms Desquilbet is a very large woman - she is a six feet and 500 pounds woman. She could have resisted me if I tried."

Daoud's and Desquilbet's Evidence

The Respondents have not given any evidence other than the written categorical denial contained in a statement dated December 12, 2000, that the Board ruled had satisfied its December 12, 2000 Order. At the hearing, Mr. Daoud declined his right to cross-examine Fuller. He refused to call evidence or to file evidence on his behalf. There was no evidence given for Ms Desquilbet or specifically on her behalf. Further, the Respondents failed to attend the hearing on March 12, 2001. Also, they failed to make final arguments even though they had ample notice of that hearing date. And although the Board specifically invited them to make submissions and gave them an extension to do so, they never made any.

FINDING OF FACTS

Ordinarily, a trier of fact is required to balance the competing versions of evidence adduced by the witnesses. In this case, however, as noted above, except for a written categorical denial, the Respondents did not refute Fuller's evidence. No evidence was adduced, orally or in writing by either Respondent. Neither respondent submitted final argument although the Board extended submissions on three separate occasions just for the benefit of the Respondents, the last being April 17, 2001.

Essentially, this case turns on the credibility of Fuller's evidence. Accordingly, the Board must assess his credibility based on his evidence given in examination-in-chief and the consistency of that evidence. The Board is mindful that the defensibility of Fuller's evidence is not determined solely on the fact that it is uncontradicted. In assessing Fuller's credibility, the Board has applied the test articulated in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), at pp. 356-357.

> Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what [the witness] has seen and heard, as well as other factors, combine to produce what is called credibility...The test must reasonably subject [the witness'] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of

the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Fuller presented himself to the Board as an unsophisticated person. That demeanor was consistent throughout the time he gave evidence. Although it was clear from his inflections and body language that he felt markedly denigrated by this incident, generally, he appeared diffident in giving evidence. Fuller appeared neither garrulous nor eloquent in giving evidence. He used very simple phrases to express his feelings. For instance, he said the ordeal made him feel very "messed up", and that it was "very hard to take the accusation of rape. It really hurt me." It seems that he expressed himself as best as he could. He appeared to have vivid recollection of the events and did not seek to embellish his evidence. In part, Fuller buttresses his evidence by documents that the Commission's counsel introduced as exhibits.

At the instances when Mr. Daoud stridently objected to certain questions or evidence in direct examination, Fuller remained calm and continued only if the Board informed him to do so. Throughout the hearing, Fuller's demeanor was consistent with the mannerism that implicitly, he maintained in his dealing with the Respondents. By observation, Fuller appears as a man of relatively small stature - about 168 centimeters and 63 kilograms.

In all the circumstances, the Board finds that Fuller was a credible witness who gave his evidence forthrightly. Thus, the Board accepts Fuller's evidence. The discrepancy in the period when he began to search for an apartment is inconsequential. The salient fact is, Fuller commenced residing at the Respondents' premises as of March 1, 1999.

Finally, there is no specific evidence before the Board concerning the relationship between Mr. Daoud and Ms Desquilbet, or whether Ms Desquilbet has a proprietary interest in 5 Juliana Square, Brampton. Both issues are essential to the question of liability. Notwithstanding, the Board finds that implicit in the evidence before it, Mr. Daoud and Ms Desquilbet are husband and wife. The Board is satisfied that at all material times of this incident, both were occupants at 5 Juliana Square, Brampton. Further, the Board finds that Ms Desquilbet, by her own admission, has a proprietary interest in the said property. In the Board's view, it is not essential, for the purpose of this case, to determine

whether her interest is a joint tenancy or a tenant in common.

ANALYSIS

The Law

The Commission and Fuller seek a finding that the Respondents violated subsections 2(1) and (2) contrary to section 9 of the *Code*. Those subsections and the definition of the term "harassment" stated in subsection 10(1) are set out below.

> **2.(1) Accommodation. - Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap or the receipt of public assistance.**
>
> **2.(2) Harassment in accommodation. - Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, family status, handicap or the receipt of public assistance. R.S.O. 1990, c. H.19, s.**
>
> **10.(1) Definitions. In Part I and in this Part[II],**
> **"harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.**

1. *Was Fuller subjected to discriminatory treatment by the Respondents because of his race when he occupied their basement apartment contrary to subsection 2(1)?*

The Board finds that Ms Desquilbet's conduct consisted of the shouting of racial epithet, the screaming of invectives at Fuller, and stomping on the ceiling of his apartment. By doing so, she violated Fuller's right to reasonable occupation of his apartment because of his race. Further, the Board finds that Ms Desquilbet fabricated the allegations that Fuller threatened to kill and to rape her. In addition, by making those heinous false allegations, and subsequently calling the police which resulted in Fuller being charged, arrested and prohibited from entering his residence, she intentionally interfered with his peaceful enjoyment of occupying his residence. The Board finds that patently,

hurling racial epithet at a tenant, itself is inherently, an acrimonious violation of subsection 2(1). Accordingly, on the basis of the facts, the Board finds that Ms Desquilbet violated subsection 2(1) of the *Code*.

There is no evidence before the Board that Mr. Daoud hurled racial epithet at Fuller. However, the Board accepts Fuller's evidence that Mr. Daoud was present during the times Ms Desquilbet heaved racial epithet and obscenities at him. The Board concludes that Mr. Daoud knew or ought to have known that racist notions were the impetus of Ms Desquilbet's objectionable behaviour towards Fuller. More specifically, Mr. Daoud knew or ought to have known that racist notions and animus motivated his spouse's decision to concoct the story that Fuller threatened to kill and to rape her and to call the police. Further, the Board concludes that Mr. Daoud's decision to give a statement to the police and the statement itself, (see Exhibit 1 (c)), which supported his spouse's false allegations, at the very least, were tainted by factors of racial discrimination. By supporting his spouse's false allegations, there would be a stronger likelihood that the police would remove Fuller from the residence. Thereby, Mr. Daoud not only appeased his spouse, but also ridded himself of a tenant who his spouse did not like because of his race.

It is quite telling that after the police removed Fuller and prohibited him from being within 100 meters of 5 Juliana Square, Mr. Daoud successfully brought an application before the Tribunal to terminate Fuller's tenancy early and to evict him: (see Exhibit 1(d)). In the "Certificate of Service", he affirmed that he gave notice to Fuller, by placing a copy of the application under the apartment door: (see Exhibit 1(d)). The Board finds that Mr. Daoud knew or ought to have known that Fuller was prohibited from entering the premises and would not receive the notice in time for the hearing. In all the circumstances, based on the facts, the Board finds that Mr. Daoud intentionally violated subsection 2(1) of the *Code*. In sum, the Board finds that the Respondents violated Fuller's rights as protected by subsection 2(1) of the *Code*.

2. *Was Fuller subjected to harassment in accommodation because of his race or colour?*

Based on the uncontradicted evidence of Fuller, the Board has found that Ms Desquilbet heaved racial epithet at Fuller. The Board concludes that conduct such as stomping on Fuller's

apartment ceiling, yelling invectives and hurling racial epithet at him while he was walking his dog also constitute harassment according to subsection 2(2): (see *Dhillon v. F.W. Woolworth Company* (1982), 3 C.H.R.R. D/743 (Ont. Bd. Inq.)); and *Reed v. Cattolica Investments et al* (1996) 30 C.H.R.R. D/331 (Ont. Bd. Inq.). The most poignant harassing conduct which Fuller states denigrated him, was concocting the allegation of a murder and rape threat and then calling the police and having Fuller arrested. Based on the facts, the Board concludes that it is obvious that Ms Desquilbet's behaviour was motivated by racist animus. In the circumstances, based on the facts, the Board finds that Ms Desquilbet subjected Fuller to harassment in accommodation because of his race contrary to subsection 2(2) of the *Code*.

Fuller did not sign a lease. However, at common law and by statute, it is generally understood that Fuller had an implicit covenant with the Respondents to have reasonable enjoyment of his residence without substantial interference by them: (see the *Tenant Protection Act*, 1997, S.O. 1997, c. 24, as amended, sections 2 and 26). The Board finds that Mr. Daoud entered Fuller's apartment unnecessarily and untimely. His intrusive conduct interfered with Fuller's reasonable enjoyment of his residence. Further, the Board finds that Fuller informed Mr. Daoud that his visits were unwelcome and inappropriate. To that end, Fuller installed a lock system to control the intrusions. As the landlord, Mr. Daoud was entitled to have a key. The Board finds that Mr. Daoud abused his landlord authority and power to breach the implicit covenant by using the key to enter Fuller's apartment unnecessarily. Further, the Board finds such behaviour towards a tenant is harassment within the rubric of subsection 10(1) of the *Code*.

It is an undisputed fact that Fuller was arrested and prohibited from entering his residence because he allegedly threatened the safety of the Respondents. Further, it is an undisputed fact that Mr. Daoud sought and won an application to have Fuller's tenancy terminated and evicted early based on false allegations. The Board finds that Mr. Daoud's actions in terminating Fuller's tenancy was unjust. That no doubt, is a rather drastic and egregious form of harassment in accommodation. Based on the facts, the Board concludes that Mr. Daoud's behaviour meets the constituent elements of harassment as defined by the *Code*. Notably, harassment must be linked to a prohibited ground enumerated under subsection 2(2) to find a violation and to reap the protection afforded under that subsection.

The Commission and Fuller contend that Mr. Daoud's conduct was racially motivated. First, the Board has found, based on the evidence, that the Respondents infringed Fuller's right to equal treatment with respect to occupancy of accommodation under subsection 2(1), at the very least, was based on racist factors. Thus, reasonably, it follows that in this case, the harassment in accommodation was tainted by racist factors. Second, Mr. Daoud was present at the hearing, but refused to adduce evidence to indicate that there was any other reason for his intrusive behaviour. His only protest was in the form of an objection that the evidence was not relevant because a "Superior Court" had heard and determined the matter previously. Based on the facts, the Board finds that Mr. Daoud subjected Fuller to harassment in accommodation because of his race contrary to subsection 2(2) of the *Code*. Indeed, the Board is mindful that Mr. Daoud rented the apartment to Fuller after knowing he was a Black man. That alone cannot blindside the "*reasonable person*" from concluding that the Respondents' subsequent behaviour was patently racist.

Adverse Inferences from Failure to Adduce Evidence

As noted above, except for a blanket categorical statement that is laconic, the Respondents refused to adduce evidence on their behalf. The Board is mindful that the Respondents are not obliged to give evidence on their behalf. Notwithstanding, it is apposite to note that this Board has taken the decision to draw adverse inferences from the Respondents' failure to tender evidence. There are authorities that are supportive of this approach: (see *Vieczorek v. Piersma* (1987), 58 O.R. (2d) 583 (C.A.) at pp. 587 - 588). The Board is mindful, however, that it must not draw an adverse inference unless and until the Commission or a complainant or both have made out a *prima facie* case against the Respondents: (see *Newman, et al v. F.W. Woolworth* (1986) 7 C.H.R.R. D/3153 (Ont. Bd. Inq.) at p. D/3164).

Establishing the *Prima Facie* Case

It is settled law that in Human Rights litigation, the Commission and the complainant have met

the civil evidentiary burden only if they establish a *prima facie* case. The civil test is on the balance of probabilities: not an "air tight case." (See *Holden v. Canadian National Railway* (1990), 14 C.H.R.R. D/12 (Fed. C.A.) at D/14, para. 7). "A *prima facie* case…is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in a complainant's favour in absence of an answer from the Respondents-employer": (see *O'Malley v. Simpson-Sears Limited* (1985), 7 C.H.R.R. D/3102 (S.C.C.) at p. D/3105, at par. 24766).

In summary, based on the facts, the Board finds that the Commission and Fuller have established a *prima facie* case that the Respondents discriminated against him because of his race contrary to subsections 2(1) and (2) of the *Code*. Further, the Board finds that by infringing those subsections, the Respondents have violated section 9 of the *Code*.

In this Board's view, the principle enunciated by the Supreme Court of Canada in *Ontario Human Rights Commission et al. v. The Borough of Etobicoke* [1985] 1 S.C.R 202 (S.C.C.) applies. More specifically, McIntyre J. at page 208 states:

> Once a complainant has established before a board of inquiry a *prima facie* case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer.

REMEDY

The Board has held a hearing according to subsection 39(1). It has found that Fuller's rights as protected under subsections 2(1) and (2) were infringed by the Respondents contrary to section 9 of the *Code*. The Board must determine, based on its findings, the appropriate order according to section 41.

Remedy in Respect of Compliance and Future Practice

Subsection 41(1)(a) confers authority on the Board to make non-pecuniary orders to achieve compliance with the *Code* and to prevent discriminatory practices in the future. The Commission, and

adopted by Fuller, asks the Board to make the following order:

> (a) direct the Respondents to post the Commission's code cards within the apartment the Respondents operate;
>
> (b) direct the Respondents to take sensitivity training course concerning discrimination;
>
> (c) direct the Respondents to (i) inform the Commission of the names of any present tenant(s), and (ii) for the next two years, inform the Commission of the names and contact information of all future tenants, so that the Commission may ensure that they are informed of their rights afforded under the *Human Rights Code*.

The Board is not convinced that ordering the Respondents to take sensitivity training concerning discrimination would have any salutary effect. The Respondents' actions throughout these proceedings do not incline the Board to conclude that such an exercise would be more than merely going through the motions. However, the Board is inclined to require the Respondents to attend a training programme on how to deal with tenants, particularly tenants who are people of colour, in the attempt to hinder such discriminatory practices being visited upon tenants or potential tenants in the future. Accordingly, the Board's remedies are set out below in the section entitled "Order".

Restitution

The Scope of the Restitutive Power

Subsection 41(1)(b) states:

> Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,
>
> (b) direct the party to make *restitution*, *including monetary compensation*, for loss arising out of the infringement, *and*, where the infringement has been *engaged in* willfully or recklessly, *monetary compensation* may include an award, not exceeding $10,000, for mental anguish. (Emphasis added).

The overarching power conferred on the Board by subsection 41(1)(b) is to order a respondent to make restitution. It is apposite to note that monetary compensation for loss arising out of the infringement is just one of a panoply of restitutive remedies under that broad power. Restitution is an equitable remedy. That restitutive power allows the Board to restore a complainant to her or his original position before the loss or injury occurred; or to place a complainant in the position he or she would have been in, if the breach had not occurred. Restitution includes the act of restoration including restoring anything to its rightful owner; the act of making good or giving the equivalent for any loss, damage or injury one sustains; or indemnification. Restitution may take on different forms depending on the nature and legal context of the breach: (see *Black's Law Dictionary, 6th ed.).*

It is clear from subsection 41(1)(b) that the Board has the discretion to include in its monetary compensation, a monetary award for mental anguish. That sum cannot exceed $10,000. It is a sum over and above the monetary compensation the Board deems appropriate for loss arising out of the infringement. It is reasonable to conclude, therefore, that it is an injury or "loss separate and apart from the loss arising out of the infringement": (see *York Condominium Corp. No. 216 v. Dudnik* (1991), 14 C.H.R.R. D/406 (Div. Ct.); *Naraine v. Ford Motor Co. of Canada (No. 5)* 28 C.H.R.R. D/267). Notably, the Board can exercise that discretionary power only if, on the evidence, the Board finds that certain elements exist.

Mental Anguish

Mental Anguish suggests a relatively high degree of mental pain and distress. It is more than mere disappointment, angry feelings, worries, resentment or embarrassment. Yet, it necessarily includes all of the foregoing. It does, however, include mental sensation of pain resulting from painful emotions such as grief, severe disappoint, indignation, wounded pride, shame, despair or public humiliation: (see *Black's Law Dictionary, 6th ed.).* Mental anguish is a subjective suffering that does not require medical proof.

Monetary Limits

Traditionally, there are two branches of damages under monetary compensation (quite apart from mental anguish), namely, tangible loss and intangible loss. Tangible loss is pecuniary loss that ensued directly from the injury or loss that a complainant sustained. Traditionally, Human Rights tribunals and the courts have referred to it as special damages. They have adopted the approach that special damages have no common law or statutory limit. Intangible loss is a non-pecuniary loss that resulted directly from the respondent discriminatory conduct. It includes the injury or loss of the intrinsic value of the right to be free from discrimination and the physical, psychological or psychiatric injury or loss to a complainant as a result of the respondent's discriminatory conduct. Human rights tribunals and the courts have identified that branch as general damages.

Previous *ad hoc* Boards and different panels of this Board have taken different interpretive and assessment approaches to subsection 41(1)(b). Some interpretations include that there is a maximum of $10,000 monetary compensation for loss arising out of the infringement; or there is a maximum of $10,000 for *each* right violated; or there is a maximum of $10,000 for mental anguish; or there is a maximum of $10,000 for mental anguish for each right infringed: (see, e.g., *Ghosh v. Domglas Inc.*(1992), 17 C.H.R.R. D/216; *MacKinnon v. Ontario(Ministry of Correctional Services)(No.3)* 1998), 32 C.H.R.R. D/1; and more recently in *Moffatt v. Kinark Child and Family Services,* [1999] O.H.R.B.I.D. No. 15, para. 31-32; and *Curling v. Torimiro,* [2000] O.H.R.B.I.D. No. 16, para. 10; *cf, Naraine, supra.*[1]). As a result, those interpretations and approaches foreclosed a globalised approach to the assessment of damages.[2]

With much respect, the plain reading of subsection 41(1)(b) does not support any of the above interpretations, or any of the approaches adopted in the assessment of monetary compensation for injury or loss that arises out of the infringement of the right: nor mental anguish. As noted above, subsection 41(1)(b) confers authority on the Board to award various forms of restitutive remedies

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1 Yet Professor Backhouse limited "general damages" to $10,000 concerning each of the two rights she found were infringed.

2 In *Ghosh v. Douglas Inc.*(1992), 17 C.H.R.R. D/216 (Ont. Bd. Inq.) at D/234 para 117, Adjudicator Hubbard states: I understand my obligation under...[41(1)(b)] to be to assess damages, not globally, but in relation to each right infringed and each party who infringed it." Also in *Reed v.Cattolica Investments Ltd.,* [1996] O.H.R.B.I.D. No. 7 at p. 15, para 109, Chair McNeilly states: "The reference in Ghosh supra, stands for the proposition that damages under s. 41(1)(b) can and should be awarded with respect to each right infringed, where requested. With respect, this was a creative approach to augment the quantum of damages because subsection 41(1)(b)

including monetary compensation, and the discretion to add on top of the monetary compensation it deems appropriate, a sum, not exceeding $10,000, for mental anguish, only if the Board finds that the respondent had engaged in willful or reckless behaviour during the infringement of the right.

By necessary implication, except for mental anguish, subsection 41(1)(b) does not impose an upper limit on the monetary compensation the Board may order. That view was enunciated in *Naraine, supra*. Moreover, recently, the Divisional Court has followed that ruling and has held that "non-pecuniary intangible damages arising out of the infringement of the *Code*...to compensate for the intrinsic value of the infringement of the complainants' rights ...[are] compensation for the loss of the right to be free from discrimination and the experience of victimization. There is no ceiling on the amount of general damages." (see *Ontario* (*Human Rights Commission*) *v. Shelter Corp.*, [2001] O.J. No. 297 (Div. Ct.). The Ontario Court of Appeal denied leave to appeal. It is apposite to note that the phrase "loss arising out of the infringement" includes components analogous to pain and suffering arising from tortuous acts in the tort/civil law context.

By the plain reading of subsection 41(1)(b), viz.: ["***and***, *where the infringement has been engaged in willfully or recklessly, a monetary compensation may include an award, not exceeding $10,000, for mental anguish*,"] implicitly, there is a presumption that a complainant could suffer mental anguish if the respondent's conduct is willful or reckless or both. And, it is clear that only one award for mental anguish is authorized.

Interpreting subsection 41(1)(b) to impose a limit of $10,000 would put that subsection at odds with subsection 15(1) of the Canadian Charter of Rights and Freedoms[3] ("*Charter*"). This is a crucial phenomenon in the context of human rights and constitutional rights because of the principles of equality enshrined in section 15 of the *Charter* and the doctrine of exclusivity which governs human rights forum in Canada: (see *Bhadauria v. Seneca College of Applied Arts and Technology (Board of Governors),* [1981] 2 S.C.R. 181 (S.C.C.). For essentially, such an interpretative approach subjects anyone who seeks to assert her or his human rights via this exclusive forum, to different treatment before and under the law and may not have equal protection and equal benefit of the law. Essentially,

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had been interpreted to have a ceiling on damages for non-pecuniary loss.

that is because a complainant who suffers from other types of wrongful conduct has resort to the civil justice system where, for example, the ceiling on general damages is much higher than $10,000: (see *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. Prince George (Bd. of Ed.)*, [1978] 2 S.C.R. 267; and *Arnold v. Teno,* [1978] 2 S.C.R. 287 – (the "Trilogy")). Moreover, the courts have enunciated that the interpretation of human rights legislation must be consistent with the *Charter*. And, the interpretation of section 15 of the *Charter* should inform the interpretation of human rights legislation across Canada: (*Quebec* (*Commission des droits de la personne & des droits de la jeunesse*) *Montreal* (*Ville*), [2000] 1 R.C.S. 665; *British Columbia* (*Public services employee relations Commission*) *v. BCGSEU,* [1993] 3 S.C.R. 3*;* and *Entrop v. Imperial Oil Ltd.* [2000], O.J. No. 2689, (2000), 2 C.C.E.L. (3d) 19 (Ont. C.A.)).

The interpretation of subsection 41(1)(b) in *Naraine, supra and Shelter Corp., supra* are salutary. First, it put to rest the notion of different treatment of a human rights complainant and a complainant of other types of wrongful conduct. Second, it facilitates the filing of a complaint on multiple grounds and allows the adjudicator to consider the impact of the combination of those grounds on the complainant or to determine whether a complainant indeed sustained more than one distinct injury or loss as a result of the infringement. Third, it facilitates a global approach to the assessment of quantum of damages and forecloses the approach of awarding damages for each separate head of liability where the respondent's conduct violates more than one section of the *Code.* Fourth, and as noted above, it makes clear that *only* $10,000 may be awarded to a complainant for mental anguish regardless of the number of rights that have been infringed or the number of distinct injuries or losses the complainant sustained. Guided by those principles, the Board now turns to determine the appropriate monetary compensation for the loss arising out of the infringement.

Pecuniary Tangible Loss (Special Damages)

The Commission and Fuller seek an award under this head for the following:

(a) $892.50 for reimbursement of 1 ½ months rent;

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3 *Constitution Act*, 1982 Schedule B to Canada Act 1982 (U.K.).

(b) $450 for the seven days that Fuller stayed in the hotel after he was prohibited from attending at his residence; and

(c) pre-judgement interest.

Fuller did not present proof for the hotel expenses. However, the Respondents did not rebut his claim. The uncontradicted evidence is that Fuller stayed at a hotel for seven days and paid $65 each day. In the Board's view, this appears to be a reasonable expense and a reasonable amount. The Board finds that as a direct result of the Respondents' discriminatory conduct, Fuller incurred $450, and therefore the Respondents must make recompense to him for the full amount.

In addition, Fuller paid Mr. Daoud $1190 for the first and last month's rent: (see *Exhibit* 1(b)). The Board finds that Fuller resided at 5 Juliana Square from March 1 to 14, 1999, when the police removed him. That removal was a direct result of the Respondents discriminatory conduct. In the Board's view, but for the ousting from 5 Juliana Square, Fuller would not have moved from his residence. Since he had resided there for two weeks, based on the principle of *quantum meruit*, the Board deducts the sum equal to two week's rent from the amount Fuller paid the Respondents as evidenced by the receipt. Thus, the Board awards Fuller $895 that includes the $10 that Mr. Daoud had not refunded to him. Accordingly, the pecuniary tangible loss award is for a total of $1,345.

Non-pecuniary Intangible Loss (General Damages)

1. Compensation for the Intrinsic Value of the Infringement of the Rights

Under this head the Commission asks for damages in the amount of $12,000 for the intrinsic losses which ensued from the infringement of Fuller's rights that are protected under subsections 2(1) and (2) of the *Code*. In support of its request, the Commission advanced several arguments and submissions. Fuller adopts the Commission's arguments and submissions.

The Commission submits that it has wrestled with the question why a white woman accused Fuller of threatening to rape her. It submits that what Ms Desquilbet tried to do is a curious

phenomenon in the human rights context as a means to get Fuller out of her house. Furthermore, the Commission argues that the allegation was spurious and has mobilized a history of racist views about white fear of Black men to white womanhood. To support its view, the Commission cites Angela Davis, *Women, Race & Class*, (New York: Vintage Books) " Race, Racism and the Myth of the Black Racist:

> In the history of the United States, the fraudulent rape charge stands out as one of the most formidable artifices invented by racism. The myth of the Black rapist has been methodically conjured up whenever recurrent waves of violence and terror against the Black community have required convincing justification: (Tab 22, at p. 173).

The Commission submits that it is a curious phenomenon that a Black police officer was present. It submits that the fact that the allegation of rape was the means adopted by Ms Desquilbet raises a serious human rights concern. The Commission argues that the police attended the residence because of the telephone calls they received from Fuller and Ms Desquilbet, each complaining about the other. Yet, when the police arrived, they chose to believe the white woman and protected her: only the Black man was arrested. The Commission stresses that the misconception that Black men were threats to white women was the only racist notion that stood to have currency and gave groups like the KKK permission to lynch Black men. Further, the Commission argues that when the complaint was made that a Black man was threatening to rape a white woman, the complaint was taken seriously. From then on, Fuller was caught in a downward spiral.

To indicate that that psychology is not endemic to the United States, the Commission submits that today, in Canada, Black people face systemic discrimination. For while it does not intend to put the Criminal Justice System on trial, Black's face problems in that system. In support of its argument, the Commission cites the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System,* 1995 (*"Report on Systemic Racism in Ontario")* at p. 21:

> Racism has a long history in Canada. It has led to denials of basic civil and political rights to Canadian citizenship...Despite important achievements, racism is still entrenched in Canadian society. Racism in Canadian Society continues to shape the lives of Aboriginal, black and other racialized people.

Thus, the Commission submits that in the context of the Criminal Justice System, which is still coming to terms with systemic discrimination, and in the context of living in an age where the Black rapist myth still exists, Fuller found himself in grave jeopardy when facing a charge of threatening to rape a white woman.

In addition, the Commission submits that Fuller was stripped searched and left naked in a jail cell while the Respondents sat in the comfort of their home on the night of March 14, 1999. He was not released until he agreed with an order not to return to his own home. Meanwhile, at a time when he was legally barred from entering his own home, the Respondents served him with an eviction notice by placing it under the door of the apartment he was prohibited from entering. Further, the Commission submits that even though the charge was ultimately withdrawn, it was long after the damage had been done.

The Commission submits that this entire ordeal was a reminder of the whole history of racial inequality and not merely an expression of the Respondents' anger. It had a significant impact on Fuller including: "he was unable to enjoy his home peacefully because of his race; lost his home – he was made homeless because of his race – no other reason; he was arrested because of his race; he was stripped searched and spent time in jail because of his race; and he suffered the stigma attached to being a rapist because of his race." In the Commission's view, there are hardly any other ways to make anyone a social pariah than accusing him of being a rapist.

Finally, the Commission submits, quoting from the *Report on Systemic Racism in Ontario* at p. 18:

> Racially abusive language adds another dimension to the spread of racialization. When white people in positions of power insult black or other racialized individuals in racially abusive terms, their words reflect society's judgments about the superiority of white people and inferiority of others. Racist language has this effect whether or not it is intended, because these judgments are built into the meaning of the words. Consequently, racial abuse both insults the targeted person and expresses a history of general contempt for the person's racial group....However, identifying the different factors at work is critical to finding appropriate remedies.

The Board accepts the submissions of the Commission and Fuller. The Board is satisfied, on the evidence, that Fuller suffered grave consequences.

In *Robichaud v. Her Majesty the Queen,* [1987].2 S.C.R. 84 at page 90, Laforest, J. states:

> Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence.

At page 92, Laforest J. adds:

> Any doubt that might exist on the point is completely removed by the nature of the remedies provided to effect the principles and policies set forth in the Act. This is all the more significant because the Act, we saw, is not aimed at determining fault or punishing conduct. It is remedial. *Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the "almost constitutional" nature of the rights protected.* (Emphasis added).

The Board finds that Fuller sustained more than one distinct loss or injury as a result of the infringement of his rights under subsection 2(1) and (2) of the *Code.* The Board finds that even though the timeframe within which the violations occurred was short, the losses arising from the violations are as diverse as they are disparate in impact. The Board finds that the infringement of Fuller's right to equal treatment in accommodation itself is a distinct loss or injury. It impacted negatively on the dignity and self-esteem of Fuller. Similarly, the harassment in accommodation itself is a distinct loss or injury. That too had a negative impact on Fuller, but of a different nature from the foregoing loss or injury. For example, Fuller's privacy was invaded by Mr. Daoud: someone who is indeed an unwelcome stranger. He endured the indignity of a peeping Tom, if you will, intruding on an intimate aspect of his life and that of his girlfriend's, who was not a tenant. His request to the Respondents and actions taken to protect his privacy were unheeded and unhelpful.

In addition to the losses or injuries of the infringement are other distinct losses or injuries,

directly flowing from them, namely: Fuller was unable to enjoy his home peacefully; he was made homeless; he was charged with threatening to rape the female respondent; he was arrested, stripped searched and detained in jail; he suffered the stigma attached to being a rapist; and he was made a social pariah by the accusation of threatening to rape someone. While the losses or injuries arose from two violations, they did not occur contemporaneously. Inferentially, they are separate losses or injuries that occurred along the space-time continuum of each incident.

It is apposite to state that whether Fuller had a criminal record is irrelevant. It would be an ill-conceived notion that Fuller's criminal record makes him less deserving of the protection afforded under the *Code* or to assert his human rights or to conclude that he lacks the insensitivity to appreciate the stigma attached to being accused of such a serious offence or that he lacks the pride of a human being who does not have a criminal record.

Implicit in the Commission's request for an award of $12,000 is that it would be apt to take a globalised approach in the assessment of monetary compensation. That approach is more pragmatic in assessing the appropriate monetary compensation under this branch because of the *sui generis* nature of human rights and the inherent nature of the usual type of injury or loss. The Board adopts a globalised approach to the quantification of monetary compensation in this case.

Integral to the injuries or losses enumerated above, Fuller sustained a grave injury or loss when he was accused of threatening to rape Ms Desquilbet and, as a result, he was subsequently detained. Essentially, he was deprived of his fundamental liberty and human dignity. The right to liberty and security of the person is so essential to any individual in a democratic society that is committed to fairness and social justice, that it is given constitutional protection in sections 7 and 11 of the "*Charter*". The gravamen of that injury or loss was enunciated by the Supreme Court of Canada in *R. v. Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.) ("*Oakes*"). At pp. 212 - 213 Dickson, C.J.C. states:

> The presumption of innocence protects the fundamental liberty and human dignity of *any and every person* accused by the State of criminal conduct. An individual charged with a criminal offence faces *grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic*

harms. This is essential in a society committed to fairness and social justice. (Emphasis added).

Heeding that Court's enunciation in *Robichaud, supra,* in the aim to identify and to eliminate discrimination, the remedy in this case must be effective and consistent with the "almost constitutional" nature of the rights protected and the grave injury or loss sustained by Fuller. Accordingly, the Board is of the view that the appropriate monetary compensation in all the circumstances of this case is $15,000. The Respondents are jointly and severally liable to Fuller for this amount.

2. *Non-pecuniary Monetary Compensation for Mental Anguish*

It is clear from the plain reading of subsection 41(1)(b) that the Board must find three elements present before it can exercise its discretion to order monetary compensation for mental anguish. First, the Board must find that the conduct complained of was contemporaneous with the infringement of the right. Second, that the conduct the respondent engaged in *at the time* of the infringement was either willful or reckless. Third, and flowing from the second, the Board must find that the complainant sustained mental anguish.

To meet the constituent element of willfulness under subsection 41(1)(b), the Board must determine whether the conduct complained of was intentional and the infringement of the complainant's right was the reason for the conduct: (*York Condominium Corp. No. 216 v. Dudnik* (1991), 14 C.H.R.R. D/406 (Div. Ct.) at p. 413). To meet the constituent element of reckless under subsection 41(1)(b), the Board must determine whether the Respondents' conduct evinces such disregard or indifference to the consequences or impact on the complainant: (*Cameron v. Nel-Gor Nursing Home* (1984), 5 C.H.R.R. D 2170).

The Commission asks the Board to award the maximum amount of $10,000 for mental anguish. The Commission submits that the Respondents' behaviour from the onset of this matter has been willful and reckless. In addition, it submits that there is no evidence that the Respondents tried to "mitigate the allegations made against them." The Commission argues that the Respondents could have tried to assuage the Board and the Commission by their subsequent conduct, but they did not.

Instead, they failed to file Pleadings and refused to attend the hearing without proof of the reason they gave for not attending. Fuller adopts the Commission's submissions.

In addition, Fuller submits diffidently, that the allegations and the way he was treated throughout the entire incident made him feel "very bad" and "messed up". He states that "it was very brutal to say I threatened to rape a woman." He states that "it was very hard to take the accusation of rape." Further, he states that the incident was a "rough ordeal" which "would always remain in my memory." He states that "it really hurt" him.

The Board is satisfied, based on the facts, that Fuller did suffer grave mental anguish as a consequence of the Respondents' objectionable behaviour. Fuller's diffidence and laconism in expressing his humiliation, wounded pride and the negative psychological impact that the whole ordeal had on him, should not underestimate the degree of his mental anguish. Further, based on the facts, the Board is satisfied that the conduct complained of was intentional and spiteful, and the infringement of the complainant's right was the reason for the conduct. In particular, the Respondents' conduct in evicting Fuller from his residence evinced marked animus and disregard and indifference to the consequences and impact homelessness would have on Fuller. Thus, the Board finds that Respondents engaged in willful and reckless conduct during the violation of Fuller's rights and during the commission of each incident.

Indeed, it would have been impossible to find otherwise given the clear violations and the objectionable conduct of the Respondents. In addition, the Board is satisfied that the Respondents' behaviour after the infringement has done much in the way to aggravate the initial mental anguish. At the hearing, Fuller lamented that even though the case was before the Board the Respondents had not changed their behaviour. It is reasonable to conclude that the demeanour of a respondent after the infringement of a right, may alleviate or aggravate the complainant's mental anguish. However, the Respondents demeanour after the infringement is not a factor in the Board's assessment of monetary compensation in this case. It is unlikely that the willful or reckless conduct after the infringement alone will be enough to meet the necessary elements to reap monetary compensation under subsection 41(1)(b).

The Board finds that an appropriate monetary compensation for mental anguish in all the circumstances of this case is $10,000. The Respondents are jointly and severally liable to Fuller for $10,000.

Pre and Post Judgement Interests

The Commission submits that the appropriate date for the commencement of pre-judgment interest is March 14, 1999, that being the date when Fuller was arrested. Fuller adopts the Commission's submission. Notably, the Respondents have not impugned the appropriateness of that date. Accordingly, the Board accepts the submissions and orders that pre-judgement interest be paid on the aggregate award of $26,345 at 5.3% according to sections 128 and 129 of the *Courts of Justice Act* R.S.O. 1990, c. C 43 as amended, from March 14, 1999 to the date of this decision.

The aggregate monetary compensation together with pre-judgement interest is determined as follows:

Principle sum of ($26,345 **x** 5.3% **x** 2.417 years) = ($3,374.82 + $26,345) = $ 29,719.82.

Post-judgement interest on $29,719.82 is payable according to the *Courts of Justice Act* from August 21, 2001.

ORDER

Compliance Concerning Future Conduct and Practices

The Board orders that for the next two years, from August 21, 2001, Sameh Daoud and Johanne Desquilbet, jointly or severally, shall do the following acts to achieve compliance with the *Code* in respect of their future conduct and practices as landlords or agents, together or individually or in conjunction with others, in the province of Ontario:

(1) keep a record (with contact information) of all their tenants, including the current tenant, if any, and where possible, any person who has made application to rent any premises that they own or in their care, custody and control, in the province of Ontario.

(2) file that record semi-annually with the Commission so that those persons could be informed of their rights or in the event of complaint in the future.

(3) give the current tenant, if any, a copy of this decision by August 21, 2001, and, any person who applies for tenancy, in any property that they own, or in their care, custody or control, in Ontario, a copy of this decision on application for tenancy.

(4) a copy of this decision must be displayed in a prominent place in the apartment by August 21, 2001.

(5) attend a training programme, approved by the Commission, designed to help landlords or building managers or superintendents to deal with landlord/tenants issues in a racially diverse society.

The Board remains seized of this matter for a two-year period from the date of this decision to deal with any issues concerning the implementation of this Order. All future issues flowing from this Order shall be dealt with by telephone conference call or in writing unless the Board directs otherwise.

Restitution

The Board orders Sameh Daoud and Johanne Desquilbet to pay to Adolph Fuller the sum of $29,719.82 on or before September 21, 2001. The breakdown of that amount is as follows:

(1) Recompense for the full down payment for the first and last month's rent and for hotel accommodation ($895 + $450) = $1,345;

(2) Monetary compensation for injuries or losses arising from the infringement of subsection 2(1) and (2) - $15,000;

(3) Monetary compensation for mental anguish - $10,000; and

(4) Pre-judgement interest on $26,345 for 2.417 years at 5.3% = $3,374.82

Failure to comply will attract post-judgement interest according to the relevant provisions of the *Courts of Justice Act*.

Dated at Toronto, this 17th day of August, 2001

"Patricia E. DeGuire"
Patricia E. DeGuire,
Vice-Chair